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June 22, 1993

HAND DELIVER

Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

ATTN: The Honorable Joseph Chachkin

RE: Trinity Broadcasting of Florida, Inc. et al., MM Docket No. 93-75, Miami, Florida

Dear Ms. Searcy:

Transmitted herewith on behalf of Trinity Broadcasting of Florida, Inc. is an original and five (5) copies filed in connection with the above-referenced docketed proceeding.

Should any questions arise concerning this matter, kindly contact the undersigned directly.

Respectfully submitted,

MAY & DUNNE, CHARTERED

By: Joseph E. Dunne III
Joseph E. Dunne III
One of Trinity Broadcasting of Florida, Inc.'s Attorneys

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In Re: Applications of	)	**MM Docket No. 93-75**
	)	
TRINITY BROADCASTING OF FLORIDA, INC.	)	**File No. BRCT-911001LY**
For Renewal of License of	)	
Station WHFT(TV), Miami, Florida	)	
	)	
and	)	
	)	
GLENDALE BROADCASTING COMPANY	)	**File No. BPCT-911227KE**
For Construction Permit	)	
Miami, Florida	)	

TO: The Honorable Joseph Chachkin
Administrative Law Judge

REPLY TO OPPOSITION

Trinity Broadcasting of Florida, Inc. (TBF), by its counsel and pursuant to Section 1.294 (c) of the Commission's Rules and Regulations, hereby submits this reply to the "Opposition to Contingent Motion to Enlarge Issues Against Glendale Broadcasting Company" ("Opposition") filed on June 7, 1993. As grounds for its Reply, TBF shows and states as follows.

I. Introduction

1. In its "Contingent Motion To Enlarge Issues Against Glendale Broadcasting Company" ("Contingent Motion"), TBF urged that if Glendale's application is not dismissed, a number of qualifying issues be designed including: false transmitter site availability claims; misrepresentations in prior applications; reporting violations; a false financial certification; nonrehabilitation from a previous disqualification for

misrepresentations; and, unreliability. The positions and analysis set forth in the "Mass Media Bureau's Consolidated Comments On Motion To Dismiss and Contingent Motion To Enlarge Issues" ("MMB Comments") support the designation of the site availability, misrepresentation, reporting, and financial issues. The Bureau further submits that consideration of the matters involving the rehabilitation and alleged compliance program of Glendale's principal, George Gardner, is properly encompassed under the other issues that should be designated. As shown below, if Glendale's application is not dismissed, all of the requested issues should be designated.

II. Glendale's Response Conclusively Proves That Raystay Made Serious Misrepresentations

2. Glendale's Opposition not only fails to refute, but conclusively confirms, that George Gardner's Raystay Company made a series of material false and misleading representations to the Commission during the period 1989 to 1992 in connection with its Pennsylvania LPTV applications. While Glendale tries to distance George Gardner personally from that grave misconduct, he is plainly responsible for what Raystay did, both in fact and under Commission policy. As the Mass Media Bureau has urged, therefore, the requested issues should be added.

A. George Gardner Is Responsible for Raystay's Misconduct

3. There is no merit to Glendale's effort to immunize George Gardner from responsibility for Raystay's misconduct. As Raystay's very active president and sole voting owner, George Gardner has complete control of Raystay. Moreover, he plainly directly and is personally involved in Raystay's business. Thus in 1990 he assured

the Commission that he was moving to "devise a compliance program to ensure that Raystay's operation" would strictly comply with Commission rules. He also pledged that he would personally review everything Raystay filed with the Commission to ensure its accuracy. And in 1991 and 1992 he personally signed the LPTV extension applications that Raystay filed. Moreover, as shown below, he was plainly fully aware of false and misleading representations that Raystay was making to the Commission.

4. In addition, Commission policy makes principals responsible for the disqualifying conduct of their subordinates. Thus, in Policy Regarding Character Qualifications, 102 F.C.C.2d 1179, 59 R.R.2d 801 (1985), the Commission squarely ruled that a corporation will be held "responsible for the FCC-related misconduct occasioned by the actions of its employees in the course of their broadcast employment." Moreover, principals may be

whether committed personally by George Gardner or by others under his supervision and control (notably his son)--is attributable to George Gardner. This is especially so under circumstances where, as here, Gardner is subject to "heightened scrutiny" by the Commission because of his prior egregious misconduct.

B. Raystay's LPTV Extension Applications

1. Raystay Used False Pretenses To Induce The Commission To Grant Its Extension Applications.

5. Glendale's Opposition makes it now abundantly clear that in December 1991 and again in July 1992 Raystay used false pretenses to induce the Commission to extend its Lebanon and Lancaster LPTV construction permits. Far from intending to construct and operate those stations, as its extension applications plainly implied, Raystay (we now learn) was trying to keep the permits alive merely so it could sell them. This is clear from the declaration of George Gardner's son, David, who states that in the fall of 1991 (which was shortly before the permits were due to expire) he was negotiating "with several parties who were interested in purchasing" the permits. Opposition, Attachment 9, p. 1. To further that effort, he even aided one potential buyer by contacting "representatives" of the site owners at the buyer's request to determine the availability of the sites. Id.

6. In its extension applications, filed in December 1991, Raystay said nothing about its plans to sell the permits. Instead, it clearly implied that work on construction was in progress. Thus, Raystay solemnly represented that it "has had discussions with equipment suppliers," that it had "entered into lease negotiations," that "a representative of Raystay and an engineer

have visited" the antenna site and "ascertained what site preparation work and modifications need to be done," and that Raystay "has had discussions with program suppliers" and "has also had continuing negotiations with local cable television franchisees to ascertain what type of programming would enable the station to be carried on the local cable system." See, Contingent Motion, Attachment 17. All of these representations gave--and were plainly calculated to give--the impression that Raystay fully intended to build and operate the stations and was moving toward that goal.

7. These representations were a tissue of deception. Raystay had no intention to construct when it filed the extension applications. Its intention was to try to sell the permits, for

Commission or otherwise tries to create impressions designed to mislead the Commission--even in pleadings containing statements that are 'technically' correct but misleading as to the known state of facts"). Glendale's own submission demonstrates that Raystay was clearly guilty of such misconduct in its LPTV extension applications.

9. The false and misleading extension applications were all personally signed by George Gardner, not by a subordinate. As Raystay's president and sole voting stockholder, George Gardner knew full well when he signed those applications that Raystay had no intention of building the stations and was trying to sell the LPTV permits. Moreover, he was obviously well aware of the false impression he was giving to the Commission in the extension applications, since he had pledged in his 1990 rehabilitation submission that he would henceforth "carefully review any such applications and statements" that he filed with the Commission. George Gardner is thus directly and personally responsible for

such agreements for their employers. Mr. March is both the hotel manager and a member of the hotel's board of directors. He is, accordingly, "aware of all contract obligations, including all lease negotiations and agreements, that may require board approval." Contingent Motion, Attachment 20, p. 4. For his part, Mr. Rick not only denied that any such negotiations took place, he checked with the other two owners of his business to insure that no such contacts took place without his knowledge. Contingent Motion, Attachment 19, p. 4.

11. Against this clear and emphatic testimony Glendale offers the obviously self-serving Declaration of George Gardner's son, David Gardner, who maintains that he called "representatives of both companies" (Ready Mixed Concrete Company and the Quality Inn), was informed that both companies were still willing to negotiate an agreement, and "... generally discussed possible lease terms with both individuals." Opposition, Attachment 9, p. 1. He does not, identify these "individuals" nor does he reveal what, if any authority these "representatives" had. Mr. Gardner's reticence on these points is particularly suspicious, since the names of the parties with whom Raystay had their initial contacts were noted, with their telephone numbers, in the applications, and the "representatives" would have had to have some authority to vary the understandings to which Messrs. Rick and March agreed in writing. Although he states that he "generally discussed" possible lease terms with both individuals, Mr. Gardner does not specify what further lease terms were discussed beyond those which had been settled in writing by both site owners following Mr. Daly's visit

almost three years earlier. In short, Gardner's vague and improbable Declaration does nothing to answer the substantial and material questions raised by the Affidavits of Messrs. Rick and March.[1]/

12. In any event, Raystay clearly misled the Commission by claiming it had "entered into lease negotiations." David Gardner now admits that he did nothing more than "generally discuss possible lease terms." Moreover, he did so in a single telephone call to a "representative" of both site owners, and was acting not for Raystay but at the request of a potential buyer who was concerned about the viability of the specified sites. These perfunctory contacts obviously were not "negotiations" in the normal sense of the word, and they were not undertaken at Raystay's initiative or on its behalf. Nonetheless, Raystay sought to convey the impression to the Commission that it was actively engaged in real negotiations for its own use of the sites. The Commission will not tolerate an applicant who, for an ulterior purpose, falsely represents that "negotiations are in process." 62 Broadcasting, Inc., 4 FCC Rcd 1768, 1773, 68 R.R.2d 1829 (Rev. Bd. 1989).

3. Glendale Admits That It Knew That Dust At the Lancaster Site Raised Serious Questions Concerning Site Suitability.

13. Mr. Rick avers that the only other visit to his site was made by someone representing himself as the "new owner of rights"

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[1]/ Glendale disingenuously suggests that Mr. March doesn't recall Mr. Gardner's telephone call. If there is a faulty memory at issue here it is Mr. Gardner's, who apparently could not identify the "representative" of Quality Inn he purportedly called, and who does not state that he spoke with Mr. March.

to place the antenna on the roof, who told him that the site was not suitable because of the dust. Contingent Motion, Attachment 19, p. 3. That conversation took place in October, 1991, some two months before Raystay filed an extension application in which it affirmed the accuracy of all representations made in its initial application, including the continued adequacy and availability of its antenna site. Glendale argues that this determination of site availability is irrelevant because the person who made it was not a representative of Raystay, but of a prospective buyer. That claim is sheer sophistry. On the one hand, Glendale relies on the purported conversations of the buyer's engineer concerning "site preparation and modifications" to support the representations made in Raystay's extension application. At the same time, it disavows the engineer's conclusions about the same subject.

14. Glendale's mental gymnastics don't stop there. Gardner, for example, maintains that "I was not told anything which would lead me to conclude that the site was unsuitable for Raystay's purposes." Opposition, Attachment 9, p. 2. However, in the previous sentence Gardner notes that the engineer "was concerned with the dust at the Lancaster site." Those two statements do not line up--the engineer who actually visited the site was concerned about the dust--but this expressed concern didn't raise any questions concerning whether the site was suitable for Raystay's purposes. Even viewing the facts in the light most favorable to Glendale, Gardner was on notice that a question had been raised concerning the suitability of the Lancaster site, a concern which required Raystay, at a minimum, to investigate the suitability of

the site before it made the unqualified representation in its extension application that its specified site remained suitable for construction.

4. Glendale's Response Proves that No "Representative of Raystay ... visited the antenna site and ascertained what site preparation work and

most recent period of construction. See, Metrovision, Inc., 2 FCC Rcd 1907, 62 R.R.2d 979, 985 (M. Med. Bur. 1987). Raystay filed two successive identical extension applications based on exactly the same event, one buyer's engineer's visit to the antenna sites. This deliberately created the false impression in the second application that the events it characterized as construction progress had occurred during the most recent period of construction, when in fact it had occurred before the previous extension. Creating that false impression was critical to Raystay's success in securing the second extension. The Commission would not likely have granted the second extension if Raystay had forthrightly admitted that the only progress on station construction was the visit of a representative of a prospective buyer to the proposed antenna site some ten months earlier.

17. George Gardner's statements in Raystay's extension applications--that Raystay had "entered into lease negotiations" and "a representative of Raystay and an engineer have visited the antenna site and ascertained what site preparation work and modifications" were needed--seem exclusively intended to create the appearance of construction moving forward. In fact, the decision the sell the authorizations had already been made. Section 73.3534 (b)[2]/ provides that construction permits may only be extended upon a showing that:

> (1) construction is complete and testing is underway; (2) substantial progress has been made in construction, such as the site has been acquired or site preparation is proceeding; or, (3) circumstances beyond the permittee's

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[2]/ Section 74. 780 makes section 73.3534 applicable to low power television stations.

> control (such as environmental concerns) have delayed construction, but the permittee has taken all possible steps to expeditiously resolve the problem.

Raystay could not have met these requirements of the rule, and would have lost its authorizations, had it not falsely represented that "negotiations" were proceeding and that the site was being readied for construction.

7. TBF Is Not Required To Show That George Gardner Knew The Falsity of the Application Representations When the Applications Were Filed.

18. George Gardner, Glendale's president and sole voting

C. Raystay's Initial LPTV Applications

1. There Can Be No "Meeting of the Minds Necessary for Reasonable Assurance If the Applicant Misrepresents the Technical Parameters of Its Proposal.

19. While Glendale argues that it received the written permission of the owners of the sites identified in the applications to specify those sites, it glosses over the fact that the essential technical details of Raystay's proposal were misrepresented or withheld from the site owners, both of whom emphatically maintain that had they been informed of Raystay's actual proposal they would not have allowed Raystay to specify the site.

20. With respect to the Lancaster site, Edward Rick avers that Mr. Daly sought permission to mount "a ten to fifteen foot antenna..." on the Ready Mixed Concrete building (Contingent Motion, Attachment 19, p. 2. Daly conveyed essentially the same impression to Barry March with respect to the Lebanon site ("the caller led me to believe that he was talking about a small, whip like antenna or some sort of small dish." Contingent Motion, Attachment 20, pp. 1-2. Neither was ever informed, until contacted by TBF, that the structures which Raystay actually proposed to construct were 97 feet and 86 feet tall, respectively, structures taller in both instances than the buildings on which they were to be mounted.[3]/ The critical difference in scale, aesthetic impact, weight, windload, and the need for possible structural modifications to the buildings comparing what Daly conveyed to

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[3]/ The sketch filed with the applications show that the height of the Ready Mixed Concrete Company building is 90 feet, and the Lebanon Quality Inn is 70 feet.

Messrs. Rick and March and what Raystay proposed to the FCC is obvious. Glendale cannot gloss over the differences as inconsequential or of no moment. Both site owners, when reviewing sketches of the proposed tower structures, expressed grave reservations concerning whether their respective roofs could

concerning the Lebanon site, he did not mention the installation of any "pedestal" to Mr. Rick.[5]/ The installation of two antennas, rather than one, not only doubles the weight of the structure necessary to hold the antenna, and, therefore, the weight which the roof must bear, it also multiples the windload and stress which the structure must withstand, and doubles the RF radiation hazard. All of these factors, particularly the extent of a possible radiation hazard in a factory or hotel where numbers of people will be congregating during the day, are essential to an informed decision concerning the feasibility and desirability of permitting an LPTV facility to utilize a particular site. This is precisely the information which Raystay withheld from the site owners here. Moreover, Raystay withheld this information from the site owners for the two full months between Mr. Daly's visit and the filing of the applications. Raystay cannot plead that the press of time prevented it from informing the site owners of changes in its plans as they matured. Instead, Raystay elected to misrepresent, through its site certification, that it had the site owners' consent.

22. However informal may be the agreements between a site owner and an applicant to satisfy a relaxed test of "reasonable assurance," the Commission has required, at a minimum, that the site owner and the applicant have a "meeting of minds resulting in some firm understanding as to the site's availability." Rem Malloy Broadcasting, 6 FCC Rcd 5843, 70 R.R.2d 9, 14 (Rev. Bd. 1991).

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[5]/ It is also significant that Mr. Daly [illegible]

Withholding from the site owner essential technical details concerning the applicant's technical proposal makes a "meeting of minds" impossible, and is a calculated deception where, as here, both site owners have expressed profound doubts concerning the

issue is warranted." MMB Comments, p. 17. In its "Reply to Opposition to Motion to Dismiss" ("Reply") filed with the Commission on June 17, 1993, which is incorporated herein by reference, TBF demonstrated that even viewing the facts in a light most favorable to Glendale, it cannot be disputed that Glendale never accepted TAK Broadcasting Company's ("TAK") Offer Letter prior to the expiration date of January 31, 1992, because it didn't comply with an express condition of TAK's Offer Letter--written acceptance by a representative of Glendale. Moreover, in light of the fact that TAK never received an answer to its Offer Letter, Glendale has not convincingly shown that it submitted any response to the Offer Letter prior to the January 31, 1992 expiration date, but raises more questions than it answers. See Reply, pp. 9-13. Further, even had Glendale accepted TAK's offer, the site was unavailable under the plain terms of TAK's lease with TBF. Glendale had, at most, only a legal dispute over its access to the site, which defeats its claim of current site availability as a matter of law. Kaldor Communications, Inc. 96 F.C.C.2d 995, 996-97, 55 R.R.2d 567 (Rev. Bd. 1984). Under any circumstance, then, Glendale's response does not answer the substantial and material questions raised by TBF concerning whether Glendale ever had and now has reasonable assurance of the availability of its antenna

in good faith that the TAK tower would be available. MMB Comments, p.14.

Accordingly, if Glendale's application is not dismissed, as TBF and the Bureau believe it should be, requested issues 3 and 4 with related forfeiture provisions must be designated.

25. Without compliance with conditions outlined in TBC's Offer Letter Glendale not only did not have reasonable assurance of its specified antenna site, in filing and then not amending its application it was guilty of a material misrepresentation concerning the availability of its specified antenna site.

IV. The Requested Reporting Issues Must Be Designated.

26. The Mass Media Bureau also correctly supports designation of the requested reporting issues because, in the Bureau's words:

> The sheer breadth of the alleged violations raises a substantial and material question as to whether Glendale was excessively careless and inattentive in fulfilling its reporting responsibilities. MMB Comments, p. 20.

Two factors make Glendale's reporting violations especially significant. First, because of Gardner's prior adjudicated misrepresentations and lack of candor, the Commission has ruled that his compliance with Commission rules is subject to "heightened scrutiny." RKO General Inc. (WAXY-FM), 5 FCC Rcd 642, 644, 67 R.R.2d 508 (1990); Letter of Roy J. Stewart, July 23, 1990, Contingent Motion, Attachment 7, p. 2. The Commission has long held that an applicant's failure to comply with Commission

723, 733, 31 R.R.2d 427 (Rev. Bd. 1974); WMJX, Inc., 85 F.C.C.2d 251, 275 (1981); L.D.S. Enterprises, Inc., 86 F.C.C.2d 283, 286, 49 R.R.2d 657 (1981).

27. Second, the "sheer breadth" of Glendale's reporting violations occurs in the face of Gardner's solemn commitment "to carefully review any...applications and statements [to the Commission] to ensure that they fully and accurately disclose any pertinent facts." Declaration of George F. Gardner, March 14, 1990, Contingent Motion, Attachment 5, p. 4. It is manifest that Gardner did not conduct the review he promised, and the breadth of reporting violations that resulted shows the importance with which Gardner viewed his compliance with Commission requirements. The Bureau's support of the requested issue is well founded.

A. Glendale Was Required To Report The Filing And Disposition of Broadcast Applications.

28. Glendale argues that TBF's request for 73.3514 and 1.65 reporting issues against it are unsupported because TBF cited no authority for the proposition that it was required to report the filing or disposition of applications filed in connection with broadcast authorizations which it had previously revealed in its application. The Form 301 is authority itself, the questions on the 301 form are clear, as are the applicant's duty to update the information contained on the application form. 47 C.F.R. § 1.65. Applicants have been answering these questions, literally, for years. Equally clear are both the rationale for the questions and the requirement to update the application information. The impact of the grant of an application on an applicant's standing under the diversity criterion of the standard comparative issue is obvious.

Likewise, since an applicant's financial showing is dependent upon a consideration of its commitments in other applications, Texas Communications Limited Partnership, 5 FCC Rcd 5876, 5878, 68 R.R.2d 656 (Rev. Bd. 1990), George Edward Gunter, 101 F.C.C.2d 1363, 60 R.R.2d 1662 (Rev. Bd. 1986), current information concerning the number and kind of the applicant's other commitments is critical to an evaluation of the applicant's financial showing. An applicant's

[redacted]

application (FCC Form 303-S), on which the same sort of information is neither requested nor required.

C. Glendale May Be Disqualified Under A Reporting Issue When Its Conduct Evidences a Pattern of Noncompliance.

30. Glendale contends that the fact that the information which it did not report in the Miami application was on file or obtainable from Commission files proves that it had no intent to deceive the Commission, and that, without proof of intent to deceive, the specification of a reporting issue is not required. However, no intent to deceive need be proven to support the addition of a reporting issue when the record shows, as it conclusively does here, that the applicant has engaged in a consistent "pattern of carelessness or inattentiveness..." Merrimack Valley Broadcasting, 55 R.R.2d 23, 24 (1983). The Commission has acknowledged that its files are "large indeed, and, some say, imperfect," Superior Broadcasting of California, Inc., 94 F.C.C.2d 904, 54 R.R.2d 773, 776, n.5 (Rev. Bd. 1983), and that it is unfair to force competing applicants to search the Commission files to obtain information which the Commission requires the applicant to report.

V. Financial Certification and Qualification Issues Are Warranted.

A. Commission Precedent Compels Addition of The Issues.

31. Only last week the Review Board released a further decision which mandates that financial certification and qualification issues be designated against Glendale. In Central Florida Communications Group, Inc., FCC 93R-29 (released June 18, 1993), the Board held that an applicant falsely certifies its

financial qualifications when (like Glendale) it relies initially on personal assets of its principals without obtaining appraisals, establishing marketability, and performing valuations that the Commission has long required. Contrary to Glendale's contention here, no subsequent amendment can cure the defect, because the Commission has made clear that an applicant cannot file initial applications with negative financial certifications, and the lack of a valid certification in the original application is a tenderability defect that requires dismissal ab initio. See, e.g., In the Matter of Application of Construction Permit for Commercial Broadcast Station (FCC Form 301), 4 FCC Rcd 3853, 3859, 66 R.R.2d 519 (1989) ("[I]f an applicant fails to certify in the application that it is financially qualified...its application will be returned as unacceptable or non-tenderable pursuant to 47 C.F.R. §73.3564"); Central Florida, supra, at ¶ 8 ("an augmented financial proposal cannot be relied upon in the absence of a showing that the applicant 'had reasonable assurance of necessary financing at the time it filed its application'").

32. Glendale's contention that a prima facie case does not exist that Gardner lacked the requisite appraisals when it certified its financial qualifications is specious. As the Mass

The Bureau thus correctly notes that the conspicuous omission of

Here, Gardner plainly knew that Glendale's financial certification relied on his ability to convert non-liquid assets and that appraisals valuing those non-liquid assets were necessary. Indeed, by his own promise, he was then in the midst of a formal compliance program to assure his awareness of all Commission requirements, and the financing letter proposed to convert non-liquid assets shows that he had consulted with counsel concerning Commission requirements. But Gardner also knew when he certified that he did not have the required appraisals and the certification was false. In these circumstances, the element of intent sufficient to justify issue enlargement is clearly present. California Public Broadcasting Forum, supra.

35. Although the Bureau agrees that the lack of appraisals renders Glendale's financial certification untrue, it comments that a financial qualification instead of a financial certification issue should be designated. Both issues should be added. The Presiding Judge has the authority to specify the financial qualifications issue where, as here, the facts so warrant. Moreover, the Bureau is correct that the absence of appraisals is a fatal defect in Glendale's original financial certification which may not be cured after-the-fact, so that a financial qualifications issue is warranted.

B. TBF Is Not Required To Prove That Glendale Intended To Misrepresent Its Financial Qualifications.

Glendale's defense concerning the financial showing in its initial application consists of its strident insistence that TBF has failed to prove that Glendale intended to make a false financial certification or deceive the Commission. The Mass Media